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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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Brian M. Adams

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3896

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EXAMINER

HYLTON, ROBIN ANNETTE

ART UNIT

PAPER NUMBER

3781

MAIL DATE

DELIVERY MODE

09/21/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Office Action Summary**

Application No.

09/977,151

Applicant(s)

ADAMS, BRIAN M.

Examiner

Robin A. Hylton

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 29 May 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-5, 15-26 and 28-37 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☐ Claim(s) 1-5, 15-20, 22, 24-26 and 28-37 is/are rejected.
- 7) ☒ Claim(s) 21 and 23 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on May 29, 2007 has been entered.

### ***Claim Objections***

2. Claims 2,3, and 15 are objected to because of the following informalities: "fitment" is misspelled in claims 2 and 3, "anda" and ".weakness" are each found in claim 15. Appropriate correction is required.

### ***Claim Rejections - 35 USC § 103***

3. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

4. Claims 1,3,5,26,29, and 31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hicks et al. (US 5,839,627) in view of Murayama (US 4,756,443).

Hicks teaches the claimed fitment comprising a spout, frangible membrane and a gripping member being recessed within the spout, but does not expressly disclose the gripping member including a semi-circular member having first and second ends with the second end unconnected to the frangible membrane, which inherently includes a semi-circular member being helical and extending approximately 180° or 270°. Hicks teaches at column 5, lines 4-6 that the member can have other desired shapes including a "tab or handle or any other protrusion suitable for grasping".

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Murayama teaches it is known to provide a gripping member including a portion formed as a ring (49) or a semi-circular (35) tab member.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the gripping member of Hicks including a semi-circular member (claim 1) and a helically shaped member (claim 5) having first and second ends with the second end being unconnected to the frangible membrane as taught by Murayama, since such a modification would have involved a mere change in the shape of a component. A change in shape is generally recognized as being within the level of ordinary skill in the art. Doing so provides a gripping member of known alternative configuration.

Regarding claims 5 and 31, it would have been obvious matter of design choice and optimization to one having ordinary skill in the art at the time the invention was made to provide the semi-circular member with an extension approximately 270° and 180°, respectively. Doing so provides a gripping member of sufficient length for gripping without the necessity of forming a ring.

5. Claims 2,24,25, and 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over the prior art as applied to claim 1 above and further in view of Wise et al. (US 3,135,441).

Hicks as modified teaches the claimed fitment except for gripping protrusions on the semi-circular member.

Wise teaches it is known to provide gripping protrusions on a gripping member used to remove a membrane.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to apply the teaching of gripping protrusions on the modified gripping member Hicks as taught by Wise. Doing so provides a more secure grasp on the member.

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6. Claims 4 and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over the prior art as applied to claim 1 above, and further in view of Guglielmini et al. (US 5,301,849).

Hicks as modified teaches the claimed fitment except for a portion of the gripping member extending above the upper end of the spout.

Guglielmini teaches it is known to provide a portion of the gripping member extending above the upper end of the spout.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to apply the teaching of a portion of the semi-circular member being above the upper end of the spout. Doing so allows for easier grasping of the gripping member as desired to break the frangible membrane.

7. Claims 32,34,36, and 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hicks in view of Murayama.

Hicks teaches the claimed fitment comprising a spout, frangible membrane and a gripping member (being recessed within the spout), but does not expressly disclose the gripping member including a semi-circular member having first and second ends with the second end being unconnected to the frangible membrane, which inherently includes a semi-circular member being helical and extending approximately 180° or 270°. Hicks teaches at column 5, lines 4-6 that the member can have other desired shapes including a "tab or handle or any other protrusion suitable for grasping".

Murayama teaches it is known to provide a gripping member as a ring (49) or a semi-circular (35) tab member.

It would have been obvious to one of ordinary skill in the art at the time the invention was

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made to provide the gripping member of Hicks to include a semi-circular member (claim 32) and helically shaped member (claim 34) having first and second ends with the second end being unconnected to the frangible membrane as taught by Murayama, since such a modification would have involved a mere change in the shape of a component. A change in shape is generally recognized as being within the level of ordinary skill in the art. Doing so provides a gripping member of known alternative configuration.

Regarding claims 32 and 36, it would have been obvious matter of design choice and optimization to one having ordinary skill in the art at the time the invention was made to provide the semi-circular member with an extension approximately 180° and 270°, respectively. Doing so provides a gripping member of sufficient length for gripping without the necessity of forming a ring.

8. Claim 33 is rejected under 35 U.S.C. 103(a) as being unpatentable over the prior art as applied to claim 32 above and further in view of Wise.

Hicks as modified teaches the claimed fitment except for gripping protrusions on the semi-circular member.

Wise teaches it is known to provide gripping protrusions on a member used to remove a membrane.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to apply the teaching of gripping protrusions on the modified gripping member Hicks as taught by Wise. Doing so provides a more secure grasp on the member.

9. Claim 35 is rejected under 35 U.S.C. 103(a) as being unpatentable over the prior art as applied to claim 32 above, and further in view of Guglielmini.

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Hicks as modified teaches the claimed fitment except for a portion of the gripping member being above the upper end of the spout.

Guglielmini teaches it is known to provide a portion of the gripping member extending above the upper end of the spout.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to apply the teaching of a portion of the semi-circular member being above the upper end of the spout. Doing so allows for easier grasping of the gripping member as desired to break the frangible membrane.

10. Claims 15 -19, and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dwinell (US 4,022,357) in view of Gronemeyer et al. (US 3,708,083).

Dwinell discloses a fitment comprising a spout **2**, a frangible membrane **12**, a line of weakness **13**, and a gripping member including a horizontally extending member **14** having a first end **15** adjacent the line of weakness. Dwinell is silent regarding a frangible connection interconnecting a portion of said lower edge of said horizontally extending member and an adjacent portion of said upper end of said spout.

Gronemeyer teaches it is known to provide a horizontally extending portion of a gripping member having a frangible connection **64** interconnecting a portion of said lower edge of said horizontally extending member and an adjacent portion of said upper end of said spout.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to apply the teaching of a frangible connection **64** interconnecting a portion of said lower edge of said horizontally extending member and an adjacent portion of said upper end of the spout of Dwinell and extending the length of the gripping member in so doing with a reasonable

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expectation of predictable results. Doing so provides an end user with additional warning of possible tampering of the associated container contents.

The gripping member engages the cap **18** upon closure thereover, thus having gripping structure.

Regarding claim 16, Dwinell as modified teaches the claimed fitment except for a second terminal end remotely located from the first end. It would have been obvious to one having ordinary skill in the art at the time the invention was made to make the horizontally member of a shape to include a first end and a second terminal end located remotely from the first end since such a modification would have involved a mere change in the shape of a component. A change in shape is generally recognized as being within the level of ordinary skill in the art. *In re Dailey*, 149 USPQ 47 (CCPA 1976). Doing so provides a known alternative shape that is structurally equivalent would have yielded predictable results to one of ordinary skill in the art at the time of the invention.

11. Claim 20 is rejected under 35 U.S.C. 103(a) as being unpatentable over the prior art as applied to claim 15 above, and further in view of Kim et al. (US 6,681,947).

Dwinell as modified teaches the claimed fitment except for a stop adjacent the first end of the horizontally extending member.

Kim teaches it is known to provide a stop to limit the propagation of a line of weakness.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to further apply the teaching of a stop adjacent the first end of the horizontally extending member of Dwinell. Doing so ensures propagation of the line of weakness in a specific direction at the desired time.



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***Allowable Subject Matter***

12. Claims 21 and 23 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

***Response to Arguments***

13. Applicant's arguments filed May 29, 2007 have been fully considered but they are not persuasive.

Applicants' remarks regarding the lack of anticipation by Hicks and Murayama are unnecessary since no rejection under 35 USC 102 was made in the last Office action.

Applicant argues pull tab 35 of Murayama is not semi-circular, but rather is L-shaped. Thus, not meeting the claim limitation. It is noted, however, that the claim does not set forth that the gripping member of claims 1 and 31 are semi-circular. The claim limitation reads "said gripping member *including* a semicircular member". The term "including" is in no way limiting the structure of the gripping member to be semi-circular.

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

In this case, it has been well established that gripping members can have any of a number of configurations as evidenced by Hicks, Saunders and O'Neal. It has also been well

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established that changing a shape of an element is within the level of ordinary skill in the art. *In re Dailey*, 149 USPQ 47 (CCPA 1976). These two facts alone are sufficient to modify the gripping member and change the shape of the gripping member of Hicks to include a semi-circular member alone.

More recently, it has been held that substitution of one known element (i.e., a ring-shaped gripping member) for another (i.e., a semi-circular gripping member) would have yielded predictable results and would be obvious to one of ordinary skill in the art at the time of the invention. There has to be no specific teaching in the reference to render what is known obvious.

Applicant was not satisfied with the previously presented facts and requested a prior art reference showing a semi-circular gripping member. Thus, the combination of Hicks and Murayama have again been set forth in this Office action to render the claimed invention obvious.

Only the specified teachings set forth in the rejections are utilized. Applicant argues the way in which the cans can be opened differentiate the gripping members of Hicks and Murayama. The gripping members of both references can be pulled to propagate the line of weakness. Thus, the function of the gripping member of each reference is the same. The sizes of the container closures are not relevant since the gripping member of Murayama is not being utilized on the fitment of Hicks. The shape of the tab is relevant to the rejection above.

### ***Conclusion***

14. Applicant is duly reminded that a complete response must satisfy the requirements of 37 C.F.R. 1.111, including: "The reply must present arguments pointing out the specific distinctions believed to render the claims, including any newly presented claims, patentable over any applied references. A general allegation that the claims "define a patentable invention" without

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specifically pointing out how the language of the claims patentably distinguishes them from the references does not comply with the requirements of this section. Moreover, "The prompt development of a clear Issue requires that the replies of the applicant meet the objections to and rejections of the claims." Applicant should also specifically point out the support for any amendments made to the disclosure. See MPEP 2163.06 II(A), MPEP 2163.06 and MPEP 714.02. The "disclosure" includes the claims, the specification and the drawings.

15. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Various prior art closures teaching features similar to those disclosed and/or claimed are cited for their disclosures. Specifically, Saunders and O'Neal each teach gripping members as a pull ring or a pull tab.

16. In order to reduce pendency and avoid potential delays, Group 3720/80 is encouraging FAXing of responses to Office Actions directly into the Group at (571) 273-8300. This practice may be used for filing papers not requiring a fee. It may also be used for filing papers which require a fee by applicants who authorize charges to a PTO deposit account. Please identify the examiner and art unit at the top of your cover sheet. Papers submitted via FAX into Group 3720 will be promptly forwarded to the examiner.

17. It is called to applicant's attention that if a communication is faxed before the reply time has expired, applicant may submit the reply with a "Certificate of Facsimile" which merely asserts that the reply is being faxed on a given date. So faxed, before the period for reply has expired, the reply may be considered timely. A suggested format for a certificate follows:

I hereby certify that this correspondence for Application Serial No. \_\_\_\_\_ is being facsimiled to The U.S. Patent and Trademark Office via fax number 571-273-8300 on the date shown below:

Typed or printed name of person signing this certificate

\_\_\_\_\_

Signature \_\_\_\_\_

Date \_\_\_\_\_

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18. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robin Hylton whose telephone number is (571) 272-4540. The examiner can normally be reached Monday - Friday from 9:00 a.m. to 4:00 p.m. (Eastern time).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Anthony Stashick, can be reached on (571) 272-4561.

Any inquiry of a general nature or relating to the status of this application or proceeding may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Other helpful telephone numbers are listed for applicant's benefit:

- Allowed Files & Publication (888) 786-0101
- Assignment Branch (800) 972-6382
- Certificates of Correction (703) 305-8309
- Fee Questions (571) 272-6400
- Inventor Assistance Center (800) PTO-9199
- Petitions/special Programs (571) 272-3282
- Information Help line 1-800-786-9199
- Internet PTO-Home Page <http://www.uspto.gov>

RAH

September 13, 2007

/Robin A. Hylton/  
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Primary Examiner  
GAU 3781